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AGENDA ITEM

For Meeting of: 4-03-03

MEMORANDUM

SUBMITTED LATE

DATE: March 31, 2003

TO: The Commission

FROM: Commissioner Michael E. Toner *MT*

RE: Proposed Amendments to Agenda Document 03-20 Public Financing of
Presidential Candidates and Nominating Conventions: Draft Notice of Proposed
Rulemaking

Attached please find amendments that I am considering offering on April 3, 2003
to amend Agenda Document 03-20.

1 **1. On page 58, line 11, insert the following:**

2
3 G. Expenditures by a Multicandidate Political Committee for Qualified
4 Campaign Expenses of a Candidate (Proposed 11 CFR 110.2(k) and
5 9034.10)

6 In December 2002, the Commission published an NPRM entitled “Leadership
7 PACs” seeking comment on its proposal to promulgate new regulations addressing this
8 specific type of multicandidate political committee. The Commission conducted a public
9 hearing on February 26, 2003, to discuss the NPRM. During the public hearing, the issue
10 of leadership PACs paying for qualified campaign expenses of potential Presidential
11 candidates during the “testing the waters” stage was raised and discussed. Because this
12 issue implicates the regulations addressing Presidential campaigns and elections, the
13 Commission has decided to seek comment on the relationship, if any, between
14 multicandidate political committees and Presidential candidates in this NPRM. The
15 Commission is continuing to review the Leadership PACs NPRM as it applies outside
16 Presidential campaigns and elections, and the comments received in connection with the
17 NPRM, and the Commission intends to conclude that rulemaking at a later date.

18 The proposed rules herein would create a new paragraph in 11 CFR 110.2 and a
19 new section in 11 CFR part 9034 that would address the payment by a multicandidate
20 political committee of a qualified campaign expense of a Presidential candidate.
21 Proposed section 110.2(k) would apply to candidates who are not accepting public
22 funding from the Presidential Election Campaign Fund for the primary or general
23 election. Proposed 11 CFR 9034.10 would apply to Presidential candidates who are

1 accepting public funding for the primary election. Because Presidential candidates who
2 accept public funding for the general election may not accept contributions from
3 multicandidate political committees, the proposed rules would not include a parallel
4 provision in 11 CFR subchapter E.

5 1. Scope of the Proposed Rules

6 Proposed 11 CFR 110.2(k) and 9034.10 would be applicable to all multicandidate
7 political committees, not just those commonly known as Leadership PACs. The rationale
8 for this approach is that leadership PACs are not defined or specifically addressed in
9 FECA or in the current Commission regulations. Rather, leadership PACs are formed as
10 multicandidate political committees that are defined and addressed in FECA and current
11 Commission regulations. In the Commission's experience, other types of multicandidate
12 political committees do not make expenditures for qualified campaign expenses of
13 potential Presidential candidates. Thus, including all multicandidate political committees
14 within the proposed rules would not have unintended consequences of encompassing
15 other types of activity.

16 Nevertheless, the Commission seeks comment on whether the proposed rules
17 should be limited to leadership PACs. If the Commission were to adopt such an
18 approach, it would also become necessary for the Commission to adopt a definition for
19 "leadership PACs." Consequently, the Commission seeks comment as to what that
20 definition should be.

21 2. Definition of "qualified campaign expense"

22 Proposed 11 CFR 9034.10(a) would include a definition of "qualified campaign
23 expense" that would vary from the current definition in 11 CFR 9032.9 but would limit

1 the scope of the proposed definition to proposed 11 CFR 9034.10. The definition in
2 proposed paragraph (a) would adopt language similar to that of 11 CFR 9032.9(a) but
3 would not include the timing element of section 9032.9(a)(1). The timing element of
4 current section 9032.9(a)(1), which limits qualified campaign expenses to expenses
5 incurred between the date a person becomes a candidate and the last day of the
6 candidate's eligibility, should not be applied here because a major goal of the proposed
7 rules is to treat qualified campaign expenses that are paid by multi-candidate committees
8 as in-kind contributions to Presidential candidates whenever such qualified campaign
9 expenses are incurred, even if they are incurred prior to the date a person becomes a
10 candidate.

11 Additionally, the proposed definition would not include the provisions in section
12 9032.9(a)(3) requiring that a qualified campaign expense comply with all Federal, state,
13 and local laws. The purpose of this provision in section 9032.9(a)(3) is to prevent the
14 authorized committees from paying for items such as parking tickets. Because the
15 purpose of proposed section 9034.10 is to treat the payment of qualified campaign
16 expenses of a Presidential candidate by multicandidate political committees as in-kind
17 contributions, it would be inconsistent with this purpose to exclude these items.

18 Proposed 11 CFR 9034.10(a)(1) and (2) would be the operative definition of
19 "qualified campaign expense" as it would be applied to proposed 11 CFR 110.2(k) and
20 9034.10. Under the proposed definition, "qualified campaign expense" would mean
21 purchase, payment, etc, that is incurred by, on behalf of, or for the benefit of a candidate
22 or the candidate's authorized committee and is made in connection with that candidate's
23 campaign for nomination. Proposed paragraph (a)(3) would provide a non-exhaustive list

1 of examples of expenses that would be considered as a qualified campaign expense, such
2 as polling expenses, staff salary, travel, and office space expenses. The Commission
3 seeks comment on whether polling expenses in proposed paragraph (a)(3)(i) should be
4 limited to polls that reference a Presidential candidate. The Commission notes that none
5 of the foregoing expenses would be qualified campaign expenses under the proposed rule
6 unless they were made in connection with a Presidential candidate's campaign for
7 nomination. The Commission seeks comment on whether more specific examples of
8 qualified campaign expenses should be provided and whether there are other expenses
9 that should be included in proposed paragraph (a)(3). The Commission also seeks
10 comments on whether it should use a terminology other than "qualified campaign
11 expenses" in this proposed section to avoid confusion with the current definition of
12 "qualified campaign expenses."

13 3. Qualified Campaign Expenses as In-kind Contributions

14 The NPRM would set forth the consequences of a multicandidate committee
15 paying for qualified campaign expenses for a Presidential candidate in proposed 11 CFR
16 9034.10(b)(1) through (4). The introductory language of proposed paragraph (b) would
17 limit the "look back" period of the proposed rules to January 1 of the year immediately
18 following the last Presidential election year. Thus, if an expenditure made by a multi-
19 candidate committee for a qualified campaign expense were made prior to that date, it
20 would not be subject to the provisions of proposed section 9034.10. The Commission
21 seeks comments on whether the "look back" period should start at a different date, such
22 as the day after the last Presidential election or some other date. Additionally, the

1 proposed rule would only apply to qualified campaign expenses paid by multi-candidate
2 committees for individuals who actually become Presidential candidates.

3 Under the proposed rule, an expenditure by a multicandidate political committee
4 for a qualified campaign expense of a Presidential candidate would have four effects.

5 First, the expenditure would be deemed as an in-kind contribution from the
6 multicandidate political committee to the Presidential candidate under proposed 11 CFR
7 9034.10(b)(1). Second, proposed paragraph (b)(2) would subject the

8 expenditure/contribution to the contribution limitations for multicandidate political
9 committees to Presidential candidates, i.e. \$5000 per election. Third, under proposed
10 paragraph (b)(3), the expenditure would count towards the expenditure limitations for

11 Presidential candidates accepting public funding under 11 CFR part 9035. Finally,

12 proposed paragraph (b)(4) would subject the expenditure to the audit provision of 11

13 CFR 9038.1. The proposed rules would also amend current 11 CFR 9038.1(a)(2) to

14 make clear that multicandidate political committees that make expenditures for qualified
15 campaign expenses would be subject to examinations and audits as deemed necessary.

16 The Commission seeks comments on whether changes to the audit provision of 11 CFR
17 9038.1 is appropriate or necessary to effectuate any new rule it may promulgate in this

18 area. It is important to note that, under this proposed rule, coordination would not be

19 relevant in determining that a multicandidate political committee has made an in-kind
20 contribution when it pays for a qualified campaign expense of a Presidential candidate.

21 As stated above, proposed 11 CFR 9034.10(b)(2) would subject a multicandidate
22 political committee's expenditure for qualified campaign expenses to the contribution
23 limitations that apply to Presidential campaign committees. Under proposed paragraph

1 (c), any amount of the expenditure that exceeds the contribution limit for multicandidate
2 political committees to Presidential candidate committees would be deemed an excessive
3 contribution and liability would attach to both the multicandidate political committee for
4 making the excessive contribution and the authorized committee of the Presidential
5 candidate for accepting an excessive contribution. The Commission seeks comment on
6 whether the proposed rules should include a provision that would allow the authorized
7 committee to "cure" the excessive contribution and, therefore, avoid liability. For
8 instance, if the authorized committee of the Presidential candidate reimburses the
9 multicandidate political committee for any expenditure for qualified campaign expenses
10 that exceed the contribution limit within thirty days of the date of the person becoming a
11 candidate, should these expenditures not be considered as excessive contributions? The
12 Commission seeks comment on this approach or suggestions on alternative ways
13 excessive contributions may be "cured."

14 While proposed 11 CFR 9034.10 would apply to Presidential candidates who
15 accept public funding for their primary election campaigns, the proposed rules would add
16 a new paragraph (k) to current section 110.2 that would apply to Presidential candidates
17 who do not accept any public funds. Proposed 11 CFR 110.2(k)(1) would incorporate by
18 reference the definition of "qualified campaign expense" in proposed section 9034.10(a)
19 for purposes of proposed paragraph (k). Proposed paragraph (k)(2) would include the
20 same "look back" period as proposed section 9034.10(b).

21 Similar to proposed section 9034.10(b)(1) and (2), an expenditure by a
22 multicandidate political committee for a qualified campaign expense of a Presidential
23 candidate who is not receiving public funds would be deemed to be an in-kind

1 contribution from the multicandidate political committee to the Presidential candidate and
2 that contribution would be subject to the relevant contribution limitations. Proposed 11
3 CFR 110.2(k)(1) and (2). Proposed section 110.2(k) would not have provisions that
4 parallel proposed section 9034.10(b)(3) and (4) because Presidential candidates who do
5 not receive public funding for their campaigns are not subject to the expenditure
6 limitations in 11 CFR part 9035 or the audit provisions of 11 CFR 9038.1. Proposed 11
7 CFR 110.2(k)(3) would include similar language as proposed section 9034.10(c) stating
8 that expenditures exceeding the contribution limits for multicandidate political
9 committees to Presidential candidates would be deemed as excessive contributions.

10 The Commission seeks comment on this proposal to treat expenditures by
11 multicandidate committees for qualified campaign expenses of Presidential candidates as
12 in-kind contributions. The Commission also welcomes comments on the ramifications of
13 such treatment as well as on the issues raised above.

2. On page 114, line 11, insert the following and renumber accordingly:

PART 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

5. The authority citation for part 110 would continue to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h, and 441k.

6. Section 110.2 would be amended by adding paragraph (k) to read as follows:

§ 110.2 Contributions by multicandidate political committees (2 U.S.C. 441a(a)(2)).

* * * * *

(k) Expenditures for qualified campaign expenses of a Presidential candidate.

(1) For purposes of this paragraph (k), qualified campaign expense has the same meaning as 11 CFR 9034.10(a).

(2) If a multicandidate political committee makes an expenditure for any qualified campaign expense of a candidate for President, who is not accepting public funding under 11 CFR subchapter E or F, on or after January 1 of the year immediately following the last Presidential election year, the expenditure shall be:

(i) Deemed to be an in-kind contribution by that multicandidate political committee to the authorized committee of the candidate for President; and

(ii) Subject to the contribution limitations set forth in paragraph (b) of this section.

(3) Any expenditure described in paragraph (k)(2) of this section, when aggregated with other contributions to the same candidate for President, that exceed the contribution limitation in paragraph (b) of this section shall be deemed to be an excessive contribution.

3. On page 154, delete lines 15-16, and replace with the following:

33. Section 9034.10 would be added to read as follows:

§ 9034.10 Expenditures for qualified campaign expenses by multicandidate political committees.

(a) Definition. For purposes of this section, qualified campaign expense means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value --

(1) Incurred by, on behalf of, or for the benefit of a candidate or the candidate's authorized committee; and

(2) Made in connection with a candidate's campaign for nomination.

(3) Examples of a qualified campaign expense include, but are not limited to:

(i) Polling expenses;

(ii) Travel expenses;

(iii) Staff salaries; and

(iv) Office space expenses.

(b) If a multicandidate political committee makes an expenditure for any qualified campaign expense of a candidate on or after January 1 of the year immediately following the last Presidential election year, the expenditure shall be:

(1) Deemed to be an in-kind contribution by that multicandidate political committee to the authorized committee of the candidate and subject to the provision of 11 CFR 9035.1(a)(3)(iv);

(2) Subject to the contribution limitations set forth in 11 CFR 110.2(b);

(3) Included in the expenditures subject to the expenditure limitations in 11 CFR part 9035; and

(4) Subject to the provisions of 11 CFR 9038.1.

(c) Any expenditure described in paragraph (b) of this section, when aggregated with other contributions to the same candidate, that exceed the contribution limitation in 11 CFR 110.2(b) shall be deemed to be an excessive contribution.

4. On page 160, line 20, insert the following and renumber accordingly:

41. Section 9038.1 would be amended by revising paragraph (a)(2) to read as follows:

§ 9038.1 Audit.

(a) * * *

(2) In addition, the Commission may conduct other examinations and audits from time to time as it deems necessary to carry out the provisions of this subchapter, including examinations and audits of multicandidate political committees operating under 11 CFR 9034.10.

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